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June 2, 1993

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Ms. Donna Searcy  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, DC 20554

Re: MM Docket No. 93-107  
David A. Ringer  
File No. BPH-911230MA  
Westerville, Ohio

Dear Ms. Searcy:

Transmitted herewith, on behalf of David A. Ringer, applicant for a construction permit for a new FM station at Westerville, Ohio, are an original and six copies of an "Opposition To Motion To Enlarge Issues" in the above-referenced FM comparative hearing proceeding.

If there are any questions with respect to this matter, please communicate with the undersigned.

Very truly yours,



Arthur V. Belendiuk  
Counsel for  
DAVID A. RINGER

AVB/pjt.0602C  
Enc.

cc: As per Certificate of Service  
David A. Ringer  
Public Inspection File

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Before the  
**Federal Communications Commission**

Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
 OFFICE OF THE SECRETARY

In re Applications of	)	<b>MM DOCKET NO. 93-107</b>
<b>DAVID A. RINGER</b>	)	<b>File No. BPH-911230MA</b>
<b>ASF BROADCASTING CORPORATION</b>	)	<b>File No. BPH-911230MB</b>
<b>WILBURN INDUSTRIES, INC.</b>	)	<b>File No. BPH-911230MC</b>
<b>KYONG JA MATCHAK</b>	)	<b>File No. BPH-911230MF</b>
<b>SHELLEE F. DAVIS</b>	)	<b>File No. BPH-911231MA</b>
<b>WESTERVILLE BROADCASTING COMPANY LIMITED PARTNERSHIP</b>	)	<b>File No. BPH-911231MB</b>
<b>OHIO RADIO ASSOCIATES, INC.</b>	)	<b>File No. BPH-911231MC</b>
For a Construction Permit for a New FM Station on Channel 280A at Westerville, Ohio	)	
To: Honorable Walter C. Miller Administrative Law Judge		

**OPPOSITION TO MOTION TO ENLARGE ISSUES**

David A. Ringer, by and through counsel and pursuant to §§1.229 & 1.294 of the Commission's Rules (47 C.F.R. §§1.229 & 1.294), hereby submits his Opposition to the "Motion To Enlarge Issues" ("Motion") filed by Ohio Radio Associates, Inc. ("ORA") on May 15, 1993. ORA's Motion is repetitive, unnecessary and should be denied. In support whereof, the following is shown:

1. In its Motion, ORA seeks the addition of issues against Ringer concerning §73.207 & §73.215 of the Commission's Rules. ORA argues that Ringer's use of a

directional antenna in this proceeding is violative of §73.215 because it fails to provide adequate spacing protection to WTTF-FM, Tiffin, Ohio. ORA also argues that Ringer has failed to show that no available fully-spaced tower sites exist and that a "short-spacing" issue should be added against his application in this proceeding.

2. Despite its claims to the contrary, ORA's Motion is nothing more than an attempt to fashion an impermissible appeal of the processing staff's ruling which previously denied its various arguments. See Hearing Designation Order, DA 93-423, ¶¶1-10, released April 15, 1993 ("HDO"). Having already failed to persuade the Presiding Judge that such an appeal should be permitted (see Memorandum Opinion and Order, FCC 93M-224, released May 4, 1993) ("MO&O"), ORA continues to press on with its erroneous contentions.<sup>1</sup> However, the time for ORA to file an appeal of the processing staff's adverse ruling has yet to arrive (see 47 C.F.R. §1.115(e)(3)) and the Presiding Judge is bound by the prior ruling of the FM processing staff. See Atlantic Broadcasting Co., 8 RR 2d 991 (1966). Therefore, enlargement is procedurally not warranted in this case.

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<sup>1</sup> ORA appears to believe that the Presiding Judge invited the filing of the instant Motion. Motion at p. 2 citing MO&O at n. 3. However, in his MO&O denying ORA's "Motion to Certify Questions to the Commission", the Judge noted that ORA had raised four matters. Therefore, while the Judge noted, in denying ORA's Motion to Certify, that bona fide Petitions To Enlarge may be permitted, his comments did not specifically refer to any of the matters raised in ORA's Motion To Enlarge.

3. Furthermore, there is no evidentiary need to add the issues requested by ORA. In its Motion, ORA raises no new evidence or facts to support its arguments and fails to explain how enlargement of the issues in this proceeding will aid the Commission in selecting the most qualified applicant for the new Westerville allotment. Additional evidence is not needed, for the Commission's processing staff has already reviewed this matter fully and has upheld Ringer's position. Adding the issues requested by ORA would, therefore, be a unnecessary act, since all of the facts and evidence surrounding this issue have already been revealed and enlargement would yield no additional useful evidence.

4. In Proposals to Reform the Comparative Hearing Process, 6 FCC Rcd 157, 161 (1991); recon. granted in part and denied in part, 6 FCC Rcd 3403 (1991), the Commission

must be denied.

5. ORA argues that the release of On the Beach Broadcasting, FCC 93-211, released May 10, 1993 ("On the Beach"), has breathed new life into its arguments.<sup>2</sup>

However, an examination of that case reveals an inapposite factual setting. In On the Beach, the applicants sought waivers of the Commission's spacing rule, §73.207, and were required, under the Commission's short-spacing waiver policy, to show that no other fully-spaced or less short-spaced sites were available. See On the Beach, supra citing North Texas Media v. FCC, 778 F. 2d 28 (DC Cir. 1985), aff'g, North Texas Media, Inc., FCC 84-456, released October 5, 1984. However, in this case, because he sought processing under §73.215 of the Rules, it was not necessary for Ringer to seek a waiver of §73.207. As the processing staff recognized, Ringer was permitted to seek processing under §73.215 and, contrary to ORA's contentions, Ringer's application properly demonstrated the required spacing under §73.215(e) of the rule. See HDO at ¶9.

6. Furthermore, the staff agreed that Ringer was permitted to assume the spacing of the former WBBY-FM, from who's tower Ringer proposes to operate his new station, and, pursuant to the "grand-fathering" provisions of §73.213,

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<sup>2</sup> ORA's position, that On the Beach is a "new matter warranting consideration", constitutes a legal argument. ORA has failed to show how the use of an administrative hearing, essentially an evidentiary proceeding, will help the Commission to resolve its legal contentions.

that Ringer was permitted to assume the previous short-spacing to WTTF-FM. See HDO at ¶8 citing Ez Communications, Inc., 8 FCC Rcd 2448 (MMB 1993).<sup>3</sup> The Commission's decision in On the Beach does not constitute a new ruling on any of these matters and ORA's reliance upon it, as a "new matter warranting consideration" is, therefore, misplaced. See Motion at page 2.

7. Because it has failed to raise a new matter, for which enlargement of the issues would be helpful to the comparative analysis in this case, ORA's Motion must be denied.

**WHEREFORE**, the above-premises considered, David A. Ringer hereby respectfully requests that the Motion To Enlarge Issues filed by ORA be **DENIED**.

Respectfully submitted,  
DAVID A. RINGER

*DAVID A. RINGER*

# **CERTIFICATE OF SERVICE**

I, PJ Thiessen, a secretary in the law firm of Smithwick & Belendiuk, P.C., certify that on this 2nd day of June, 1993, copies of the foregoing were mailed via first class mail, postage pre-paid, to the following:

The Honorable Walter C. Miller (\*)  
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Federal Communications Commission  
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Washington, DC 20554

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Federal Communications Commission  
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PJ Thiessen